

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JESSE GROSSMAN,

Plaintiff,

vs.

23-CV-6

NEW YORK STATE OFFICE  
OF MENTAL HEALTH  
(Buffalo Psychiatric Center),  
and DR. ANN MARIE T. SULLIVAN,  
COMMISSIONER OF THE NEW YORK STATE  
OFFICE OF MENTAL HEALTH, in her Official  
Capacity,

Defendants.

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**REPLY MEMORANDUM IN FURTHER SUPPORT  
OF DEFENDANTS' MOTION TO DISMISS**

LETITIA JAMES

Attorney General of the State of New York  
*Attorneys for Defendants*

/s/ Jennifer Metzger Kimura

BY: JENNIFER METZGER KIMURA

DENETRA D. ROBERTS

Assistant Attorney General, of Counsel

350 Main Street, Suite 300A

Buffalo, NY 14202

Telephone: (716) 853-8477

[Jennifer.Kimura@ag.ny.gov](mailto:Jennifer.Kimura@ag.ny.gov)

[Denetra.Roberts@ag.ny.gov](mailto:Denetra.Roberts@ag.ny.gov)

**Preliminary Statement**

Plaintiff Jesse Grossman brings the above-cited action against Defendants New York State Office of Mental Health (“OMH”) and Dr. Ann Marie T. Sullivan, Commissioner of OMH (“Commissioner”) (collectively “Defendants”). Dkt. 5. The amended complaint purports to set forth the following claims arising out of the course of Plaintiff's employment within OMH. First, Plaintiff brings suit against the Commissioner alleging she was subjected to disparate treatment because of her age in violation of the Age Discrimination in Employment Act (“ADEA”). *Id.* at First Cause of Action. Second, Plaintiff alleges Defendants engaged in an unlawful pattern and practice of discrimination due to age in violation of the New York State Human Rights Law (“HRL”) *Id.* at Second Cause of Action.

Defendants moved to dismiss the amended complaint on the following grounds: (1) the first cause of action against the Commissioner pursuant Fed.R.Civ.P. 12(b)(6) because she is barred from suit as she is entitled to sovereign immunity; and (2) the court should not exercise supplemental jurisdiction for the Plaintiff's alleged state law claims since the parties are entitled to sovereign immunity. *See* Defendants' Notice of Motion and Moving Memorandum, Dkt. 10 and 10-1, respectively.

Thereafter, on July 7, 2023, Plaintiff submitted her response entitled Plaintiff's "Memorandum of Law in Opposition to Defendants' Motion to Dismiss" (hereinafter Plaintiff's Opposition"). Defendants submit this memorandum of law in reply to Plaintiff's Opposition and in further support of Defendants' motion to dismiss the complaint. Dkts. 10 and 13.

**Argument**

**POINT I**

**PLAINTIFF’S INJUNCTIVE RELIEF CLAIM AGAINST COMMISSIONER SULLIVAN IS BARRED BY THE ELEVENTH AMENDMENT**

While it is not entirely clear what the demand for prospective relief is against the Commissioner, Plaintiff’s Opposition states that the operative amended complaint is an ADEA claim against the Commissioner in her official capacity seeking an award of injunctive relief. *See* Dkt. 13, pp. 4-5. Such request for relief is still barred by the Eleventh Amendment.

Generally, the Eleventh Amendment bars claims that seek monetary or retroactive injunctive relief. *KM Enters v. McDonald*, 2012 U.S. Dist. LEXIS 138599, \*16 (E.D.N.Y. Sept. 25, 2012); *citing Rothenberg v. Stone*, 234 F. Supp. 2d 217, 221 (E.D.N.Y. 2002). Prospective injunctive relief is available against a state officer in his official capacity under *Ex parte Young*, 209 U.S. 123, 155-156 (1908); *KM Enters* at \*18. The courts apply “a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective relief.” *Verizon Maryland, Inc., v. Public Service Com’n of Maryland*, 535 U.S. 635, 645 (2002); *citing Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997); *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (“A plaintiff may avoid the Eleventh Amendment bar to suit and proceed against individual state actors...provided that his complaint (a) alleges an ongoing violation of federal law and (b) seeks relief properly characterized as prospective.”) (internal quotations omitted). “A plaintiff may not...seek even equitable relief (such as reinstatement to an employment position) as compensation for past, isolated conduct.” *Javed v. Medgar Evers College of the City Univ. of N.Y.*, 2017 U.S. Dist. LEXIS 161095, \* 12 (E.D.N.Y. Sept. 29, 2017); *quoting A.A. v. Bd. of Educ., Cent. Islip Union Free Sch. Dist.*, 196 F. Supp. 2d 259, 267 (E.D.N.Y. 2002).

Defendants acknowledge that under *Ex parte Young*, there is a limited exception to the application of sovereign immunity principles recognized to the extent that a State officer threatens to prospectively violate the federal Constitution. 209 U.S. 123, 156-57 (1908); *see also Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The Supreme Court has recognized that a State official, sued in his or her official capacity, could be enjoined prospectively from violating federal law. 209 U.S. at 156. Yet, as the Supreme Court clarified in *Edelman v. Jordan*, federal courts may not issue injunctions against State officials, which would require an award of retroactive [] relief. 415 U.S. 651, 677 (1974) (when a plaintiff sues a state official alleging violation of federal law, the court may award an injunction directed to future conduct but not retroactive monetary relief); *see also Papasan v. Allain*, 478 U.S. 265, 277-78 (1986) (*Young* also does not authorize retrospective relief for allegations of past violations of federal law). Rather, *Ex parte Young* authorizes relief only when the complaint alleges an ongoing violation of federal law. 209 U.S. at 125.

Plaintiff's demand of injunctive relief "to correct and remedy the Commissioner's discrimination", while on its face might be characterized as prospective relief, it is not. The plain reading of Plaintiff's amended complaint does not implicate *Ex parte Young* as there is not "an ongoing violation of federal law." *KM Enters* at \*21; *citing Green v. Mansour*, 474 U.S. 64, 73 (1985) (emphasis added). If a complaint "is based entirely upon past acts and does not allege continuing conduct that, if stopped, would provide a remedy to a plaintiff, then it does not implicate *Ex parte Young*." *KM Enters* at \*20. Plaintiff resigned from OMH on December 26, 2018. *See* Dkt. 5, ¶ 22. The amended complaint is merely based upon past acts that occurred almost five years ago. Thus, *Ex parte Young* is not applicable.

At no point in Plaintiff's amended complaint or in her Opposition does Plaintiff articulate

any ongoing federal violations of age discrimination. Rather, it is riddled with mere conclusory allegations against the Defendants in an attempt to raise a plausible inference of discrimination. As an ongoing violation of federal law is a crucial requirement for *Ex parte Young* relief, the failure to properly allege same is fatal and the claim should be dismissed.

Accordingly, Plaintiff's demand for injunctive relief against the Commissioner must be dismissed as a matter of law by virtue of the Eleventh Amendment.

## **POINT II**

### **PLAINTIFF'S CLAIM FOR PROSPECTIVE RELIEF IS MOOT**

Assuming *arguendo* that *Ex parte Young* was applicable, Plaintiff's demand for injunctive relief against the Commissioner still fails. A case is moot, and federal courts have no jurisdiction over the litigation, when "the parties lack a legally cognizable interest in the outcome." *Cty. of Los Angeles v. Davis*, 440 U.S. at 631, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 1950-51, 23 L. Ed. 2d 491 (1969)); *Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 16 (2d Cir.1994) (same). "[T]he mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit, including the pendency of the appeal." *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir.1993). Plaintiff purportedly seeks injunctive relief "to correct and remedy the Commissioner's discrimination" and "to cease and desist from engaging in the illegal and unlawful acts and practices described" in the complaint. *See* Dkt. No. 1, p. 6. However, Plaintiff voluntarily resigned from OMH effective December 26, 2018. *See* Dkt. 5 at ¶ 22. Therefore, she no longer has an interest in the outcome sought as she is not an OMH employee and will not benefit from the requested injunction, if granted. As such, the claim is moot.

**CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss should be granted, with prejudice, in its entirety.

DATED: July 28, 2023  
Buffalo, New York

Respectfully submitted,

LETITIA JAMES  
Attorney General of the State of New York  
Attorneys for Defendants

BY: /s/ Jennifer Metzger Kimura  
JENNIFER METZGER KIMURA  
DENETRA D. ROBERTS  
Assistant Attorney General, of Counsel  
350 Main Street, Suite 300A  
Buffalo, NY 14202  
Telephone: (716) 853-8477  
[Jennifer.Kimura@ag.ny.gov](mailto:Jennifer.Kimura@ag.ny.gov)  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2023, I electronically filed the foregoing Reply Memorandum with the Clerk of the District Court using its CM/ECF system, which would then notify Plaintiff's counsel of record:

Harvey P. Sanders, Esq.  
Sanders & Sanders  
401 Maryvale Drive  
Cheektowaga, NY 14225

DATED: July 28, 2023  
Buffalo, New York

LETITIA JAMES  
Attorney General of the State of New York  
Attorneys for Defendants

BY:

/s/ Jennifer Metzger Kimura

JENNIFER METZGER KIMURA

DENETRA D. ROBERTS

Assistant Attorney General, of Counsel

350 Main Street, Suite 300A

Buffalo, NY 14202

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[Denetra.Roberts@ag.ny.gov](mailto:Denetra.Roberts@ag.ny.gov)